1982 September 17

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS GEORGHIOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF INTERIOR,

Respondents.

(*Case No.* 108/75).

Practice—Recourse for annulment—Court can examine ex proprio motu the question whether sub judice decision is an executory one or not.

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—Administrative act confirming a previous decision to the same effect—It becomes an executory act in cases where there has been a new inquiry into new substantive legal or factual elements—No new facts submitted to the respondent in addition to the facts on which a previous executory decision was taken—Therefore sub judice decision a confirmatory one —Not of an executory nature and cannot be attacked by a recourse under Article 146 *of the Constitution.*

In view of the subsidence of the ground of Korfi village in 1969 the Council of Ministers decided on 15.5.1969 the removal of the said village to another nearby locality approving at the same time certain conditions* under which the removal should take place. Between the years 1969 and 1973 applicant applied to be included in the list of those entitled to a new residence at the new village and his application was rejected on the ground that he was not permanently residing at Korfi village and he did not own a house there.

* The main conditions are quoted at p. 830–831 post.

On April 11, 1975, counsel for applicant had a meeting with the Minister of Interior to whom he presented his case. By letter dated May 28, 1975, the respondent Authority informed the applicant that he was not entitled to a house; and hence this recourse.

At the hearing of the recourse counsel for the respondent submitted that the decision complained of was a confirmatory one of a previous decision and, therefore, not being of an executory nature, could not be attacked by a recourse under Article 146 of the Constitution. He further submitted that the Court can examine ex proprio motu whether an act or decision of an organ or authority is of an executory nature or not.

Counsel for the applicant submitted that as there was no allegation in the opposition that the decision complained of was a confirmatory one, the Court could not examine it ex proprio motu and, furthermore, it was admitted in the opposition that the case of the applicant was re-examined by the respondent Authority.

Held, (1) that the trial Judge is competent to examine ex proprio motu the question whether an administrative act or decision is of an executory nature or not (see *Razis and Another* v. *Republic* (1982) 3 C.L.R. 45 at p. 50).

(2) That a new inquiry takes place when the administration takes into consideration new substantial legal or factual elements; that the statement made by the respondent authority that the case of the applicant was re-examined does not automatically render the decision complained of, of an executory nature; that it is a question of fact as to whether new substantive legal or factual elements were considered in taking the new decision in order to render it an executory one; that even the parties to the proceedings themselves cannot by agreement render a confirmatory decision an executory one (see Tsatsos, Recourse for Annulment, third ed. p. 136); that as it appears from the documentary evidence, adduced in these proceedings, no new facts were submitted to the respondent Authority by the applicant in addition to the facts on which the previous decisions were taken; that, therefore, the decision complained of in this recourse being a confirmatory one of previous decisions, is not of an executory nature and so it cannot be attacked by a recourse

under Article 146 of the Constitution; accordingly the recourse must fail.

Application dismissed.

Cases referred to:

Razis and Another v. *Republic* (1982) 3 C.L.R. 45 at p. 50;

Lordos Apartotels Ltd. v. *Republic* (1974) 3 C.L.R. 474.

Recourse.

Recourse against the decision of the respondents whereby they failed to review their original decision not to grant applicant a dwelling house in the new village of Korfi.

L. N. Clerides, for the applicant.

N. Charalambous, Senior Counsel of the Republic, of the respondents.

Cur. adv. vult.

MALACHTOS J. read the following judgment. The applicant in this recourse claims a declaration of the court that the act and/or decision of the respondents not to review their original decision not to grant to the applicant a dwelling house in the new village of Korfi, which decision was communicated to the applicant on 27.5.75, is null and void and of no legal effect whatsoever.

The relevant facts of the case are as follows:

The applicant is an elementary school teacher and comes from Korfi village in the District of Limassol.

In view of the subsidence of the ground of Korfi village in 1969 the Council of Ministers by its Decision No. 8737 dated 15.5.69, exhibit 2, decided the removal of the said village to another locality nearby, approving at the same time, fifteen conditions under which the said removal should take place.

The main conditions with which we are concerned in the present recourse are conditions Nos. 1, 4, 8, 10 and 12, which read as follows:

1. The grant of a building site free of charge of an extent of about 8,000 square feet.

4. Preparation of the architectural plans free of charge by the Town Planning and Housing Department.

8. The Government subsidization for the erection of the new houses is fixed at the amount of 75%.

10. The owners of a residence who reside permanently in the village are entitled to the grant of a new residence; and

12. The Government does not undertake any liability towards the owners of houses in the village who permanently reside in another place outside their village.

On the basis of the above decision of the Council of Ministers the Village Commission of Korfi prepared a list, exhibit 17, of the persons entitled to a new residence which was submitted to the District Officer. In the said list the name of the applicant does not appear.

By letter dated 28.4.69, exhibit 11, the parents of the applicant complained to the District Officer of Limassol for the non inclusion of their son in the said list and alleged that he was the owner of a house under Registration No. 1562, which was granted to him after his marriage. To this application a negative reply was received. This reply was contained in a letter dated 25.9.69, exhibit 12, addressed by the District Officer to the father of the applicant. The applicant at the time of the subsidence of the ground of Korfi village was posted at the said village and was residing in a house which was provided for the school teacher posted at the time at Korfi. He was transferred to Limassol town in 1971.

The matter remained at that till 10.3.70 when the applicant, himself, applied to the District Officer for his inclusion in the list of those entitled for a residence at the new village. In his said application, exhibit 13, he put forward the allegation that besides other immovable properties he was the owner of a house granted to him after his marriage in 1955. Although being a school teacher he could not live all the year round at Korfi, yet he used to visit the village and reside there with his family during the summer months and Christmas and Easter holidays looking after his other immovable properties. To his above application a certificate of the Chairman of the Village Commission of Korfi dated 9.3.70, exhibit 13A, was attached, where his allegations are certified as true and correct.

As it appears from a letter dated 1.5.70, exhibit 14, addressed

to the District Officer his above application was rejected on the ground that he was not permanently residing at Korfi village and he did not own a house there. This letter reads as follows:

"I acknowledge receipt of your negative reply to my relevant application for grant by the Government to me a residence at the new village of Korfi in view of the removal of the said village due to subsidence of the ground but both the criteria taken into account for such decision are disputable for the following reasons:

1. In the first criteria about my permanently residing or not at the village of Korfi I wish to remind you that my obligatory residence at the place of my work due to the nature of my profession as a school teacher in no case can, as I believe, deprive me of my right as a permanent resident of Korfi since, as I have referred above, during the holidays I return regularly to my village and spend all the time cultivating my properties there with my family.

2. The second criteria about the non possession of a house in the village, I think that this was decided by inadvertence of the relevant certificate of the Mukhtar about this, which was attached to my first application and was despatched to you".

To this application of the applicant the District Officer replied by letter dated 28.5.70, exhibit 15, which reads as follows:

"I have the honour to refer to your letter dated 1st May, 1970, in connection with the grant of a house at Korfi and to inform you that your application has been reexamined but, unfortunately, your case is not covered by the relevant Decision of the Council of Ministers and, consequently, no house at the said village can be granted to you.

If you wish the grant of a building site at cost price, as in the case of Messrs. Costas Pogalou and Chr. Evangelou, then your application will be examined favourably".

By letter dated 13th January, 1971, the applicant applied to the respondent authority for a grant to him of a house in the new village of Korfi.

The District Officer of Limassol by letter dated 17th June,

1971, informed the applicant that his application could not be accepted. As a result the applicant on the 17th August, 1971, filed Recourse No. 318/71 claiming a declaration of the court that the decision of the respondent communicated to the applicant by letter dated 17th June, 1971, by which the applicant was refused a new house at Korfi village, should be declared null and void and of no legal effect whatsoever.

This recourse was on the 26th June, 1972, withdrawn upon an undertaking by the respondent authority to reexamine the case of the applicant.

On the 4th August, 1972, the applicant submitted a new application to the respondent authority and attached thereto in support of his case a certificate of the Village Commission where it was certified that he was the owner of a house at Korfi village. This application, by letter dated 20th April, 1973, addressed to the applicant by the District Officer of Limassol, was also rejected for the same reasons as his previous one.

The applicant on 2nd July, 1973, filed Recourse No. 233/73 by which he was again claiming a declaration of the court that the act and/or decision of the respondent not to grant to the applicant a house in the new village of Korfi, which decision was communicated to the applicant by letter dated 20th April, 1973, is null and void and of no legal effect whatsoever.

This recourse eventually came before the trial Judge on the 3rd July, 1974, and upon statements made by counsel for the parties, the recourse was dismissed as withdrawn. The relevant record of proceedings is as follows:

"For Applicant: Mr. L. Clerides

For Respondent: Mr. Kypridimos

Clerides: The legal aspect of the sub judice decision depends on a number of facts which, unfortunately, so far, have not been placed by the applicant fully before the respondent authority in order to enable it to take the proper decision, I, therefore, intend to apply afresh to the respondent authority furnishing the full facts of the case, supported by documentary evidence, a fact which eventually necessitates a reexamination of the case afresh by the respondent.

In this respect, I undertake to file a new application with the full facts within one month from today.

Kypridimos: In the light of the statement of Mr. Clerides, the respondent authority is prepared to reexamine applicant's application.

Clerides: In view of the statement of my learned friend on the other side, I apply for leave to withdraw the present recourse.

COURT: Leave granted. Case struck out, no order as to costs."

On the 11th April, 1975, counsel for applicant had a meeting with the Minister of Interior to whom he presented his case. By letter dated 28th May, 1975, exhibit 15, the respondent authority informed the applicant that he was not entitled to a house in the new village of Korfi and so the applicant filed the present recourse.

At the hearing of the case one of the submissions put forward by counsel for the respondent authority is that the decision complained of is a confirmatory one of a previous decision and, therefore, not being of an executory nature, cannot be attacked by a recourse under Article 146 of the Constitution. He further submitted that it is a general principle of administrative law that the trial Judge in a recourse can examine ex proprio motu whether an act or decision of an organ or authority is of an executory nature or not.

Counsel for applicant, on the other hand, on the above point submitted that as there is no allegation in the opposition that the decision complained of is confirmatory of a previous one the court cannot examine it ex proprio motu and, furthermore, it is admitted in the opposition that the case of the applicant was reexamined by the respondent authority. In any case, he added, the certificate of the Village Commission dated 14.12.72, exhibit 3, in which it is certified that the applicant owned a house at Korfi village, is a new fact which was considered by the respondent authority at the time of taking the decision complained of and so this fact alone renders this decision a new one.

The answer to the question as to whether the trial Judge

trying a recourse under Article 146 of the Constitution can examine ex proprio motu whether an act or decision by an organ or authority is of an executory nature or not, has been given in a recent decision of the Full Bench of this Court in *Panos Razis and Another* v. *The Republic* (1982) 3 C.L.R. 45, where at page 50 it is clearly stated that the trial Judge is competent to examine ex proprio motu the question whether an administrative act or decision is of an executory nature or not. So the submission of counsel for applicant on this issue cannot stand.

As to what is a new decision it has been decided by this Court in the case of *Lordos Apartotels Ltd.* v. *The Republic* (1974) 3 C.L.R. 471, where at page 474 the following passage from Stassinopoulos on the Law of Administrative Disputes, 4th edition, is cited:

> "When does a new enquiry exist, is a question of fact. In general, it is considered to be a new enquiry, the taking into consideration of new substantive legal or factual elements, and the used new material is strictly considered, because he who has lost the time limit for the purpose of attacking an executory act, should not be allowed to circumvent such a time limit by the creation of a new act, which has been issued formally after a new enquiry, but in substance on the basis of the same elements. So, it is not considered as a new enquiry, when the case is referred afresh to a Council for examination exclusively on its legal aspect or when referred to the Legal Council for its opinion or when another legal provision other than the one on which the original act was based is relied upon if there is no reference to additional new factual elements. There is a new enquiry particularly when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or although preexisting were unknown at the time which are taken into consideration in addition to the others, but for the first time. Similarly, it constitutes new enquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration".

The statement made by the respondent authority that the case of the applicant was reexamined does not automatically

render the decision complained of, of an executory nature. As it has been stated above, this is a question of fact as to whether new substantive legal or factual elements were considered in taking the new decision in order to render it an executory one. Even the parties to the proceedings themselves cannot by agreement render a confirmatory decision an executory one (see in this respect Tsatsos, Recourse for Annulment, third edition, at page 136).

As it appears from the documentary evidence adduced in these proceedings, no new facts were submitted to the respondent authority by the applicant in addition to the facts on which the decision of 20.4.73 was taken which decision was attacked by Recourse No. 233/73. The material facts which are stated in the Certificate of the Village Commission dated 14.12.72, exhibit 3, are the same as those stated in two previous certificates dated 9.3.70, exhibit 13A, and 16.9.70, exhibit 10, issued by the Village Commission of Korfi and which were considered by the respondent authority when the decisions attacked by the previous recourses were taken. Therefore, the decision complained of in this recourse being a confirmatory one is not of an executory nature and so it cannot be attacked by a recourse under Article 146 of the Constitution.

In view of my decision on this issue I consider it unnecessary to pronounce on the other issues raised in this recourse.

In the result, this recourse fails and is dismissed.

On the question of costs, I make no order.

Recourse dismissed. No order as to costs.